Appendix "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES D. CHARLES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

No. 16,477
May 4, 1960

Appeal from the United States District Court
for the District of Hawaii

Before: CHAMBERS, BONE and MERRILL, Circuit Judges.

BONE, Circuit Judge.

Appellant stands convicted on four counts of an indictment, two counts charging unlawful acquisition and importation of a package of marijuana found upon his person and two counts containing similar charges in regard to a second package discovered in his garage. Appellant contends that both packets of narcotics were wrongfully admitted into evidence, that they were obtained by searches and seizures which violated the Fourth Amendment.

Five members of the Honolulu Police Department arrested appellant at the door to his home upon two warrants sworn out by his wife charging threatening and assault and battery. Appellant invited the officers inside the house while he read the warrants. He was "frisked" at this time and found to be unarmed. A patrol wagon was summoned to pick up the prisoner. One of the officers testified that as he walked into the house he detected the odor of burning marijuana in the air. Another officer accompanied appellant's sister-in-law outside the house to an automobile in order to get appellant's eyeglasses. Upon their return this officer stated to another officer that appellant was supposed to have marijuana on his person. Appellant was told to empty his pockets on the kitchen

cash. Among the articles thus placed in view by the first packet of marijuana. Appellant was then arrested for the unlawful possession of narcotics, and a subsequent search of the premises revealed the second packet in the garage. The officers did not have a search warrant.

Appellant makes a three pronged argument. He contends that the sole dealing were the admissibility of evidence obtained by police officers of a municipality in the then Territory of Hawaii in federal courts must apply the rule of Weeks v. United States, 232 U.S. 383 (1914), rather than the so-called "silver platter" doctrine announced in Lustig v. United States, 338 U.S. 74 (1949). He next argues that in causing appellant to empty his pockets on the kitchen table the officers engaged in an unlawful search which cannot be considered incident to the admittedly valid arrest upon the two warrants for threatening and assault and battery. Finally, he contends that the probable cause to arrest appellant at any time prior to the discovery of his packets of the unlawful possession of narcotics, and that no police could neither search his person nor the garage as an incident thereof.

We think both packages of marijuana were lawfully obtained. Consequently, we find it unnecessary to determine which exclusionary rule would apply when territorial law enforcement officers consummate a search in contravention of the Fourth Amendment. The discovery of the packet of marijuana upon appellant's person was properly adjudged the subsequent arrest for unlawfully possessing narcotics was founded upon probable cause enabling the police to search the premises for the purpose of finding further evidence of the narcotics violation and to seize in the course of that search the second package of marijuana. Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339 U.S. 56 (1950); Vida v. United States, Supreme Court, 28 S.Ct. 60; Williams v. United States, 271 F.2d 781, 795 (9th Cir. 1959), cert. denied, 4 L.Ed.2d

It is beyond dispute that an officer making a valid arrest may search the person of the accused as an incident of his arrest.

The "silver platter" doctrine is currently under fire. Compare Elkins v. United States, 266 F.2d 723 (D.C. Cir. 1958) with United States v. Lanza, 271 F.2d 787 (7th Cir. 1959). A pertinent Supreme Court decision is forthcoming; see 359 U.S. 965, granting certiorari in Elkins v. United States, 266 F.2d 175, (9th Cir. 1958).

Weeks v. United States, supra, at 392; Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925). Courts have historically permitted such a search for a number of reasons: Closson v. Morrison, 47 N.H. 482, (1867) (to protect arresting officer, to deprive prisoner of means of escape); Reitsnyder v. Lee, 44 Iowa 101, 105 (1876) (to avoid destruction of evidence). See United States v. Rabinowitz, supra at 72 (dissenting opinion); Dillon v. O'Brien, 16 Cox Crim. Cas. 245 Exch. Ireland 1887). Here the record clearly shows that the search of appellant's pockets was designed to uncover narcotics although appellant was not yet under arrest on narcotics charges. In other words, the purpose of the search was to obtain evidence of a crime different from that for which appellant was arrested. A search of appellant's premises provoked by such a purpose would violate the Fourth Amendment. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). One problem here is whether or not the second search of appellant's person was similarly invalidated because the police were seeking to obtain evidence of a crime uncharged. Assuredly, a second search of appellant's person for concealed weapons, improving upon the earlier, desultory "frisking" would not aggravate constitutional strictures.

Searches of both the person arrested and the place where the arrest is made derive their legality in the absence of a search warrant from the existence of a lawful arrest. Without probable cause to arrest, subsequent searches either of person or property violate the Fourth Amendment. That a search is incident to a valid arrest saves it from proscription. The apparent reasoning behind this principle is that once a valid arrest is made, the privacy of the accused has for the most part been lawfully destroyed. Further intrusion connected with and justified by the fact of arrest should not be precluded. Accordingly, a search of the place of arrest for evidence of the crime for which the accused has been arrested is permissible. However, if police action is not justified by or connected with the arrest, such as when a search of the place of arrest is designed to uncover evidence of a crime other than the one upon which the arrest was made, the further intrusion upon privacy cannot be tolerated. When a search has nothing to do with the arrest, it cannot be deemed incident to the accused's

apprehension. Divorced from the search, the fact of arrest does not justify impairment of the right to privacy.

On the other hand, it seems to us that a search of the person of the accused, even for the purpose of uncovering evidence of a crime other than that which is charged, is generally incident to a valid arrest. Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be asserted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, see People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923), unless they violate the dictates of reason either because of their number or their manner of perpetration.[2] Hence, we think that the second search of appellant's person was permissible under the Fourth Amendment, and the packet of marijuana thereby obtained was properly admitted into evidence. Consequently, as previously noted, the search for the second package was also lawful, and it too was properly seized and correctly admitted in evidence.

In deciding as we do, we need not determine whether or not the police officers, having lawfully entered appellant's house at his invitation, had probable cause to arrest him for a narcotics viola-

[2] Modern police practice calls for a thorough search at the station-house of any person who is taken into custody as well as the "frisking" which takes place at the moment of arrest. See Honolulu Police Department, General Orders at p. 50 (1957); San Francisco Police Department, Rules and Procedures, §§ 12.47-12.51; United States Marshals Manual at p. 7040[1]; Calahan, The Policeman's Guide at p. 113 (1952); Sheehan, Modern Police Work at p. 337 (1939). Such searches are not unreasonable; they are an integral part of efficient police procedure. See Bascomb v. United States, 227 F.2d 454 (10th Cir. 1955). We cannot say that an accused may be thoroughly searched for a second time at the station-house, but not pending the arrival of the patrol wagon. No right to privacy would be enhanced by such a position. We would only be affording the accused the opportunity to dispose of incriminating evidence before he reaches the place of initial detention.

ing on the sole strength of the identifiable odor of burning marijuana in the air, a nice problem further complicated by the fact that both appellant and his sister-in-law were present in the room where the odor was detected. See Johnson v. United States, 333 U.S. 10 (1948). Nor need we determine, assuming probable cause to arrest on narcotics charges, whether or not the search of appellant's pockets was justified as an incident of that arrest. The search followed both the acquisition of the assumed probable cause for the narcotics arrest and the arrest upon the warrants for assault and battery and threatening, nor it preceded the formal announcement of the narcotics arrest of which it might be deemed an incident. In this regard, *compare* People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955), *with* Pepani v. United States, 84 F.2d 160 (9th Cir., 1936).

The judgment of the lower court is affirmed.

Endorsed: Opinion Filed May 4, 1960.

Frank H. Schmid, Clerk.

In the absence of an applicable federal statute the validity of an arrest without a warrant is a matter of local law. United States v. Di Re, 332 U.S. 581, 589 (1948); Johnson v. United States, *supra* at 15; Miller v. United States, 357 U.S. 301, 305 (1958). The Hawaii statute applicable in the instant case is 2 Rev. Laws of Hawaii 1955, 255-3. No Hawaii decision deals with probable cause predicated upon the odor of smell.

Appendix "B"

United States Court of Appeals
for the Ninth Circuit

No. 16,477

James D. Charles,
Appellant.

vs.

United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Hawaii.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: May 4, 1960
Frank H. Schmid, Clerk.

Appendix "C"

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., Sec. 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The war-

rant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

"(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commis-

sioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(d) Return of Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall

file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. As amended Dec. 27, 1948, eff. Oct. 20, 1949.

Appendix "D"

TESTIMONY OF OFFICER WRAY STRAUSS.

"Q. To what duties are you normally assigned at the Police Station?

A. Narcotics Squad, the Vice Division.

Q. And to what duties is Sergeant Akana normally assigned?

A. Morals Squad.

Q. Also a part of the Vice Division?

A. Yes, sir.

Q. What was the nature of the two warrants that Sergeant Akana had for service on the defendant that evening?

A. Both warrants—one threatening, and one assault and battery, issued by Mrs. Charles, alias Susan Takahashi."

(T. 11)

"Q. And invited you in and said that he wanted to read the warrants?

A. The service was made at the door there, and he said he wanted to read the warrants, asked come on in.

Q. And you say that after you came in he was, if I quote your words accurately, frisked in the normal manner?

A. The normal search for weapons, yes.

Q. And that was the normal search that was made for the service of an A&B and threatening warrant?

A. Whenever a person is arrested.

Q. No search was made for the suspected contraband until after Officer Sandiago came in and said that

Charles was supposed to have some marihuana, is that correct?

A. Just a package of cigarettes that he had sticking out of his pocket.

Q. I said, no search was made beyond this frisking that took place immediately after you entered the room until after Officer Sandiago came in and stated that Charles was supposed to have some marihuana?

A. That's right."

(T 45, 46)

"Q. From the time that you entered the house and until the time he first produced the package of cigarettes from his pocket, you were then in the kitchen, and about how long elapsed?

A. About 15, 20 minutes, I guess.

Q. And during that 15 or 20 minutes, what was done?

A. Charles had asked us in. We all walked in. He walked ahead, naturally, the first one, and Sergeant Akana and myself. As we walked in, as soon as we walked into this living room, I smelled a strong odor of marihuana. I called Sergeant Akana's attention to it, and we continued on into the room. I myself started checking as we walked in the living room, checking the ash trays. We met the girl. More or less everyone stood right within the living room. The warrants were explained to Mr. Charles. I believe he asked Sergeant Akana a few questions in regard to the warrants. He couldn't understand it. He was back with his wife again. He couldn't understand it."

(T 47)

FILE COPY

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FILED
JUN 21 1960
JAMES R. BROWNING, Clerk

No. ~~979~~ 118

In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES D. CHARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
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Attorney,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217	5, 6
Go-Bart Importing Company v. *United States*, 282 U.S. 344	5
Harris v. *United States*, 331 U.S. 145	5, 6, 7
Jones v. *United States*, 357 U.S. 493	5
Lustig v. *United States*, 338 U.S. 74	3
United States v. *Lefkowitz*, 285 U.S. 452	5
United States v. *Rabinowitz*, 339 U.S. 56	7
White v. *United States*, 271 F. 2d 829	6

Statutes:

21 U.S.C. 176(a)	2
26 U.S.C. 4744(a)	2

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 976

JAMES D. CHARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 161–165) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1960 (R. 166). The petition for a writ of certiorari was filed on May 31, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when a person has been arrested pursuant to a valid warrant unrelated to narcotics, it is proper to search his person and the premises and to seize contraband marihuana so found.